

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

James L Duncan,  
Complainant

v.

Sonoma Marin Area Rail Transit District  
Defendant

Case No. C.21-06-011

REPLY TESTIMONY OF JAMES L. DUNCAN

COMPLAINANT

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DEFENDANT

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June 5, 2023

Complainant James L. Duncan respectfully submits this Reply Testimony as authorized by the e-mail Ruling Adjusting Procedural Schedule, March 6, 2023.<sup>1</sup>

**Procedural Summary, June 22, 2022-March 31, 2023:** “On June 22, 2022, Application (A.) 15-05-014<sup>2</sup> was consolidated with this proceeding. As a result of the consolidation, the schedule for this Complaint was suspended pending the resolution of a Petition for Modification (PFM) that was filed by the Commission’s Rail Safety Division in A.15-05-014 on January 24, 2022.”<sup>3</sup> On November 17, 2022, the Commission adopted Decision 22-11-025 which denied Rail Safety Division’s Petition for Modification of D.16-09-002. On November 21, 2022, an e-mail ruling was issued unconsolidating this proceeding and A.15-05-014. A revised Assigned Commissioner’s Scoping Memo and Ruling was issued on December 19, 2022. On December 22, 2022, Rail Safety Division (RSD) and Sonoma-Marin Area Rail Transit District (SMART) filed Applications for Rehearing of D.22-11-025. On February 4, 2022, an extension of time to March 31, 2023 was authorized for the parties to file Opening Testimony. On March 2, 2023, a public “Jennings Avenue Rail Crossing Community Meeting”<sup>4</sup> (Meeting) was held at the Helen Lehman School in Santa Rosa at which officials of SMART and the City of Santa Rosa (Santa Rosa) made presentations regarding the approved at-grade pedestrian and bicycle rail crossing at Jennings Avenue in Santa Rosa and addressed comments from the public.<sup>5</sup> On March 6, 2023, an E-mail Ruling Adjusting Procedural Schedule was issued. On March 17, 2023, Decision 23-03-045 (D.23-03-045) in A.15-05-014 became effective and denied the Applications for Rehearing of D.22-11-025<sup>6</sup> by SMART and the Rail Safety Division (RSD). Although D.23-03-045 was issued after this proceeding was no longer consolidated with A.15-05-014, it addressed the

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<sup>1</sup> See at: <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M503/K265/503265121.PDF>

<sup>2</sup> Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit (SMART) Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.

<sup>3</sup> Assigned Commissioner’s Scoping Memo and Ruling, December 19, 2022, at p. 2.

<sup>4</sup> See Video “Jennings Avenue Rail Crossing Community Meeting – March 2, 2023” at: <https://www.youtube.com/watch?v=smM8Hv7pk-o>

<sup>5</sup> The “Jennings Avenue Rail Crossing Community Meeting” was not sponsored by the Commission nor did any representatives of the Commission attend or participate in the Meeting.

<sup>6</sup> These Decisions were issued in A.15-05-014, the related proceeding regarding the Commission’s approval of the Application of the City of Santa Rosa for an at-grade pedestrian and bicycle rail crossing at Jennings Avenue in Santa Rosa.

Applications for Rehearing of D.22-11-025, which was issued when the proceedings were still consolidated.

**Procedural Summary, April 1, 2023-June 5, 2023:** On May 5, 2023, an e-mail ruling was issued revising the schedule in this proceeding.<sup>7</sup> An evidentiary hearing is now scheduled for August 7-8 2023 from 10:30 am to 3:30 pm. A list of witnesses to be called at the evidentiary hearing is to be served on the Administrative Law Judge and all parties by June 30, 2023. Opening briefs are now due on September 8, 2023 and reply briefs are due on October 13, 2023.

The closely-related state court case now pending in the First District Court of Appeal, *Duncan v. Sonoma-Marin Area Rail Transit District*, A165783, is now fully briefed as of May 31, 2023 (A165783 is regarding the Judgment in the Sonoma County Superior Court case, *Duncan v. Sonoma-Marin Area Rail Transit District*, SCV-266092). Unless a party requests oral argument by June 11, 2023 the appeal will be deemed submitted for decision.

### **Summary of Prepared Testimony of Eddy Cumins**

On January 26, 2022, I met with Assistant City Manager and Director of Public Works for the City, Jason Nutt, and City Manager, Maraskeshia Smith. During that meeting, *I agreed to meet with the City to specifically discuss SMART and the City's ongoing efforts to reach an **agreement for a crossing at Jennings Avenue**.* (Italics and emphasis added.) Prepared Testimony of Eddy Cumins, p. 4

On August 24, 2022, Bill Gamlen, SMART's Chief Engineer, SMART Board of Directors member, Chris Coursey, Mayor Rogers, City Managers Jason Nutt and Maraskeshia Smith and myself met via Zoom to continue the ongoing discussion on reaching an ***agreement for a crossing at Jennings Avenue***. (Italics and emphasis added.) Prepared Testimony of Eddy Cumins, p. 5.

SMART and the City collectively decided to hold a joint community meeting in part, to gage where the public stood on the issue of an at-grade vs. grade separated crossing, whether the pathway and improvements made in the Jennings Avenue vicinity after the City's application adequately addressed the community's needs, and how to best ***move forward in reaching a resolution on a Jennings Avenue crossing***. (Italics and emphasis added.) Prepared Testimony of Eddy Cumins, p. 5.

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<sup>7</sup> See at: <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M508/K571/508571313.PDF>

***SMART understands the Commission disagrees with SMART and RSD's position. For SMART, an agreement for an at-grade crossing at Jennings Avenue would have to include all available safety enhancements.*** (Italics and emphasis added.) Prepared Testimony of Eddy Cumins, p. 7.

Assuming all technical issues are resolved (i.e., ***contemplated additional safety enhancements in the proposed design that gets approved by RSD and the City obtaining the necessary funding***), ***SMART will require the City to execute an agreement*** that will address the City's responsibility related to the construction, ownership, operation, maintenance, repairs and replacement of the at-grade crossing improvements at Jennings Avenue, as well ***a requirement that the City maintain adequate insurance naming SMART as an additional insured.*** Given SMART's position ***on the safety of an at-grade crossing at this location***, SMART will also ***require indemnification language in which the City assumes the risk and responsibility associated with the at-grade crossing.*** (Italics and emphasis added.) Prepared Testimony of Eddy Cumins, p. 7.

It is my understanding that SMART and the City have discussed ***the agreement for an at-grade crossing including risk and indemnification language and insurance provisions*** as far back as the meetings in 2019 with Senator Mike McGuire. SMART has also brought this to the attention of City Attorney, Sue Gallagher, on several occasions – including in April 2019, September 2021 and January 2022. (***See Exhibit A*** – a true and correct copy of SMART's September 2021 and January 2022 correspondence to City.) It is my understanding that SMART has not received a substantive response to any of these communications. (Italics and emphasis added.) Prepared Testimony of Eddy Cumins, pp. 7-8.

This remains a significant issue ***that must be resolved before an agreement can be reached for an at-grade crossing at Jennings Avenue.*** (Italics and emphasis added.) Prepared Testimony of Eddy Cumins, pp. 7-8.

***Based upon my background and experience, I believe an at-grade crossing at Jennings Avenue will result in fatalities.*** I would be ***negligent in my duties as a General Manager*** if I did not voice ***my safety concerns and recommend grade separation or use of the improved crossing at Guerneville Road.*** (Italics and emphasis added.) Prepared Testimony of Eddy Cumins, p. 8.

Bill Gamlen and I participated jointly with the City and the community in an attempt to ***make progress towards a resolution.*** City Manager Jason Nutt and I spoke right after the March 2nd Joint Community Meeting. I requested an additional meeting with the City to ***continue discussions about a Jennings crossing*** – including terms ***associated with indemnification for an at-grade crossing.*** As outlined above, SMART and the City ***must work cooperatively on the outstanding issues before a resolution is reached.*** (Italics and emphasis added.) Prepared Testimony of Eddy Cumins, p. 8.

Summary of Attachment A to Prepared Testimony of Eddy Cumins

(September 15, 2021, Letter from SMART to Sue A. Gallagher, Santa Rosa City Attorney.)

As you know, SMART and the City are in disagreement regarding the safety of an at-grade crossing at Jennings Avenue. **SMART agrees with the experts from the State's Rail Safety Division that an at-grade crossing at the Jennings location is unsafe and unnecessarily and unreasonably dangerous.** On the other hand, **City has taken the position that an at-grade crossing at the Jennings location is safe.** (Emphasis added.)

1. City's willingness to assume risks and responsibilities for the crossing

Given the City's posture, and **SMART's agreement with the experts at the Rail Safety Division that an at-grade crossing at Jennings is unsafe**, if the ***City still wishes to proceed with the construction of an at-grade crossing at Jennings***, it is reasonable for SMART to inquire into whether City is willing to assume the risks related to and take responsibility for an at-grade crossing at Jennings. To that end, we request that City provide SMART with a response as to whether **City is willing to agree to the following:**

1. **City to pay SMART just compensation for a property interest in SMART's right-of way for an at-grade crossing.**
2. City to pay for the costs of construction of the at-grade crossing at the time the crossing it is built.
3. City to own the crossing improvements.
4. City to pay the cost for ongoing operation of the crossing.
5. **City to pay the cost to maintain, repair, replace, and remove the crossing improvements.**
6. **City to maintain adequate insurance naming SMART as an additional insured.**
7. **City to agree to assume the risks and to defend and indemnify SMART, its directors, officers, agents, employees and others acting on SMART's behalf.**

On April 24, 2019, **SMART's General Counsel sent you an email** noting that assuming technical issues are resolved on a crossing, **City and SMART would need to reach an agreement on these terms.** That email also stated that given that **SMART does not believe that an at-grade crossing at this location is safe SMART would require broad indemnification** and provided you with sample language that would protect **SMART given its and Rail Safety Division's concerns.** (Emphasis added.)

### Duncan's Reply to the Prepared Testimony of Eddy Cumins and Attachment A

Cumins' testimony, cited above, makes repeated references to SMART's "ongoing *efforts to reach an agreement for a crossing at Jennings Avenue*"; "ongoing discussion on reaching an *agreement for a crossing at Jennings Avenue*"; and "how to best *move forward in reaching a resolution on a Jennings Avenue crossing*." (Italics and emphasis added.)

Cumins' testimony, cited, above, asserts furthermore that "For SMART, *an agreement for an at-grade crossing at Jennings Avenue would have to include all available safety enhancements*"; "*SMART will require the City to execute an agreement* that will address the City's responsibility"; "as well as *a requirement that the City maintain adequate insurance naming SMART as an additional insured*"; "*require indemnification language in which the City assumes the risk and responsibility associated with the at-grade crossing*"; "[Santa Rosa's assent to these requirements] remains a significant issue *that must be resolved before an agreement can be reached for an at-grade crossing at Jennings Avenue*." (Italics and emphasis added.)

Cumins' testimony asserts "an at-grade crossing at Jennings Avenue will result in fatalities"; "I would be negligent in my duties as a General Manager if I did not voice my safety concerns and recommend grade separation or use of the improved crossing at Guerneville Road"; [To] "make progress towards a resolution"; [and]"to continue discussions about a Jennings crossing – including terms associated with indemnification for an at-grade crossing. [And] As outlined above, SMART and the City must work cooperatively on the outstanding issues before a resolution is reached." (Italics and emphasis added.)

However, Under Article 12, §8 of the California Constitution, A public body, such as SMART, may not regulate matters over which the Legislature grants regulatory power to the CPUC.

Under Public Utilities Code §§1201-1202 and §99152, the CPUC has exclusive jurisdiction to determine that a rail crossing meets safety requirements. D.16-09-002 approved the construction of an at-grade crossing at Jennings Avenue and ruled that "The City has convincingly shown that it has eliminated all potential safety hazards."<sup>8</sup> Cumins' testimony cited above, however, asserts to the contrary that the approved Jennings Crossing is actually unsafe and further that SMART

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<sup>8</sup> D.16-09-002 at p. 41.

has ultimate authority to dictate the terms of an agreement that Santa Rosa must assent to before the approved crossing can be constructed.

Under Public Utilities Code §1759(a), only the Supreme Court and the courts of appeal may review CPUC decisions. D.16-09-002, D. 17-08-017, and D.19-10-002 are all final and not subject to review. SMART has never filed an Application for Rehearing of any Commission Decision or a Petition for Modification or any actions in the state courts but regardless Cumins' testimony, cited above, continues to assert, contrary to the Public Utilities Code and the Commission's decisions, cited above, in effect that the approved Jennings Crossing is unsafe and should not be constructed and reopened.

Under Public Utilities Code §1709, final CPUC decisions are conclusive in all collateral matters. D.16-09-002 has been reaffirmed by D.17-08-017, D.19-10-002, and D.23-03-045 but SMART in Cumins' testimony, cited above, continues to disregard D.16-09-002 as well as the other subsequent decisions.

Under Public Utilities Code §702, public utilities' obedience and compliance with final CPUC decisions is mandatory. In D.19-10-002, the Commission directed that SMART shall comply with D.16-09-002 and cooperate in good faith with Santa Rosa to reach an agreement regarding the construction of the approved crossing at Jennings Avenue. SMART's Board has not acted to reach any construction agreement or provided any public direction to SMART's management employees. Further, SMART in Cumins' testimony, cited above, continues to assert the approved crossing is unsafe and subject ultimately to SMART's authority rather than that of the Commission.

Under Commission Rule 1.1, a party to a proceeding agrees to comply with state laws and to respect the Commission and its Administrative Law Judges. As summarized above, SMART has failed to comply with D.16-09-002, D.17-08-017, and D.19-10-002, Public Utilities Code §§702, 1201, 1202, 1709, 1759(a), 99152, and California Constitution Article XII, Section 8. Cumins' testimony, summarized above, disregards and disrespects the Commission and its Administrative Law Judges.

## Summary of Prepared Testimony of Bill Gamlen

### QUESTION 13 :

Were you involved in efforts to reach a *reimbursement agreement* between the City and SMART *for construction of an at-grade crossing at Jennings Avenue?* (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, pp. 6-7.

### ANSWER 13 :

[O]n September 28, 2016, Robert M. Sprinkle, *Deputy Director of Traffic Engineering* for the City .... *requested SMART provide a construction estimate* for the installation of the signaling equipment, gate arms, bells, lights, swing gates, crossing concrete panels, railroad tie removal and replacement, asphalt approaches, signal house installation, second train blank out sign, static signing, grading, fencing removal and replacement, electrical and signaling work, and all appurtenances. ....(Italics and emphasis added.) Prepared Testimony of Bill Gamlen, pp. 6-7.

### QUESTION 14 :

Did SMART and the City enter into an *agreement for reimbursement for construction of an at-grade crossing at Jennings Avenue?* (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, pp. 7-8.

### ANSWER 14 :

*No reimbursement agreement was reached.* .... On June 9, 2017, *I sent* Mr. Nutt, via email, what I hoped would be a final draft of a proposed *reimbursement agreement for the at-grade crossing at Jennings Avenue.* (citation to exhibit omitted). In my email, I explicitly stated the proposed *reimbursement agreement* I was attaching to the email would have to *go to the SMART Board.* Thereafter, on June 13, 2017, I received an email from Mr. Nutt stating that he would ask the *City Manager to sign* the June 9, 2017 proposed *reimbursement agreement* so that it could *go to the SMART Board.* On June 14, 2017, the *City hand delivered* the June 9, 2017 proposed *reimbursement agreement to SMART's administrative office* .... The June 9, 2017 proposed *reimbursement agreement* was *signed* by the *City Manager.* (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 8.

### QUESTION 15 :

Did the June 9, 2017 proposed *reimbursement agreement go* before the *SMART Board?*



ANSWER 15 :

***No. The SMART Board was not asked to authorize the June 9, 2017 reimbursement agreement.*** (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 8.

QUESTION 16 :

At some point after the CPUC granted the City's application for an at-grade crossing at Jennings Avenue, did SMART have concerns that ***impacted the ability of SMART to come to an agreement with the City for construction of the at-grade crossing?*** (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 8.

ANSWER 16 :

.... In ***evaluating Jennings Avenue***, SMART began to feel that this ***particular location was a bad location for a new at-grade crossing.*** This culminated in me sending a letter to the City on August 20, 2018 expressing my concerns over an at-grade crossing at Jennings Avenue. SMART's position was that ***things had changed*** since the CPUC granted the City's application. .... And during this same time, ***Rail Safety Division*** ("RSD" formerly "Safety Enforcement Division" or "SED") continued to ***oppose an at-grade pedestrian and bicycle crossing at Jennings Avenue citing numerous safety concerns.*** I outlined ***these same concerns raised by RSD to the City in my August 20, 2018 letter.*** ***SMART came to agree with RSD that any support SMART initially showed for an at-grade crossing at Jennings Avenue was due to a lack of operational knowledge*** on SMART's part. (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, pp. 8-9.

QUESTION 17 :

Despite your August 20, 2018 letter to the City expressing concerns over the at-grade crossing at Jennings Avenue, did SMART continue good faith efforts to reach an agreement with the City? Prepared Testimony of Bill Gamlen, p. 10.

ANSWER 17 :

SMART continued to be open to discussions ***on a safe at-grade crossing at Jennings Avenue.*** On February 12, 2019, I attended a status briefing meeting before Administrative Law Judge Debbie Chiv. ALJ Chiv invited SMART – who was not yet a party at that time – to present its position and its concerns with efforts to ***reach an agreement with the City on an at-grade crossing at Jennings Avenue.*** At the status briefing hearing, SMART made clear that ***should the City present additional safety measures for the design and construction of the proposed at-grade crossing,*** SMART would ***continue good faith efforts to come***

*to a formal agreement.* (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 10.

In April 2019, SMART and the City – *aided by Senator Mike McGuire* – continued meeting in person and in writing *on the terms and conditions of an at-grade crossing at Jennings Avenue.* SMART and the City continued back and forth discussions not only on *additional safety enhancements for an at-grade crossing*, but also, again the City committed to *reevaluating the possibility of a grade separated option.* (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 10.

Also in April 2019, while *SMART awaited the City to provide plans for a revised design for an at-grade crossing at Jennings Avenue* that would incorporate the additional safety features discussed during the status briefing with ALJ Chiv, SMART General Counsel, Tom Lyons, initiated discussions with Sue Gallagher in the City Attorney’s Office *regarding insurance, maintenance and indemnity provisions that an agreement for construction of an at-grade crossing would have to include.* (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 10.

QUESTION 18 :

Did SMART eventually become a party to the City’s Application 15-05-014 for an at- grade crossing at Jennings Avenue? Prepared Testimony of Bill Gamlen, p. 10.

ANSWER 18 :

It is my understanding that the City’s application – granted in 2016 – was set to expire on September 20, 2019. Although SMART and the City had met several times in person and via telephone and exchanged numerous written communications between the granting of the application in 2016 and the Fall of 2019, *no agreement – for either funding or construction – had been reached for an at-grade crossing at Jennings Avenue.* (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 11.

In response to direction from ALJ Chiv, on February 22, 2019 and April 12, 2019, the City sent SMART correspondence continuing the discussion of *incorporating additional safety measures for a proposed at-grade crossing at Jennings Avenue and for revisiting the possibility of a grade-separated design.* (citations to attached exhibits omitted). A few days later, on April 19, 2019, the City submitted a Petition for Modification of Application 05-05-014 seeking an extension of time for SMART and the City to *come to an agreement.* (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 11.  
SMART formally became a party to the City’s application when it responded to the City’s Petition for Modification in 2019. Prepared Testimony of Bill Gamlen, p. 11.

QUESTION 19 :

Did SMART oppose the City's April 19, 2019 Petition for Modification? Prepared Testimony of Bill Gamlen, p. 11.

ANSWER 19 :

SMART formally responded to the City's April 12, 2019 correspondence on May 30, 2019. In May and June 2019, SMART and the City continued discussing *safety enhancements for an at-grade crossing and the advantages and disadvantages of revisiting new grade-separated crossing designs*. (Citations to attached exhibits omitted.)

However, SMART, RSD and the Northwestern Pacific Railroad Company ("NWP")<sup>9</sup> opposed the City's Petition for Modification filed on April 19, 2019. SMART was of the *opinion* that given the *changed conditions of the Guerneville Road crossing*, not having had an opportunity to *fully evaluate the City's proposed safety enhancements* presented in its April 12, 2019 correspondence, and the possibility of the parties *revisiting a grade separated option, an at-grade crossing was unsafe and unnecessary*. (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, pp. 11-12.

However, the *CPUC disagreed with SMART, RSD* and NWP and granted the City's Petition for Modification on October 17, 2019. (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 12.

QUESTION 20 :

Did SMART continue good faith efforts after the CPUC granted the City's Petition for Modification on October 17, 2019, to reach *an agreement* with the City *for an at-grade crossing at Jennings Avenue*? (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 12.

ANSWER 20 :

Yes. SMART and the City continued to discuss *safety enhancements of an at-grade crossing and the possibility of revisiting a grade separated crossing*. On November 25, 2019, *Senator Mike McGuire again aided* SMART and the City in the hopes of coming to *an agreement on a crossing at Jennings Avenue*. SMART participated in efforts with *Senator McGuire's* office in good faith to resolve the parties [sic] *differences on a crossing at Jennings Avenue*. (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 12.

Despite ongoing good faith efforts by SMART to reach an agreement, there were still *outstanding safety concerns over an at-grade crossing*, the desire – and

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<sup>9</sup> NWP is no longer an active party in A.15-05-014.

agreement from the City – to revisit *a newly designed grade separated option*, and no response from the City on *insurance, maintenance and indemnification that would be necessary before any agreement for an at-grade or grade separated crossing could be reached*. (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, p. 12.

QUESTION 21 :

Did SMART oppose the City’s July 16, 2021, Petition for Modification? Prepared Testimony of Bill Gamlen, p. 12.

ANSWER 21 :

Yes, SMART *opposed* the City’s July 16, 2021 Petition for Modification *for the same reasons as it opposed the 2019 Petition for Modification*. Despite efforts to discuss important issues such as *safety enhancements for an at-grade crossing, revisiting the possibility of a grade- separated crossing and indemnity provisions, the parties were unable to come to an agreement*. (Italics and emphasis added.) Prepared Testimony of Bill Gamlen, pp. 12-13.

**Duncan’s Reply to the Prepared Testimony of Bill Gamlen**

Gamlen’s testimony cited above establishes that the “*Deputy Director of Traffic Engineering* for the City [of Santa Rosa] .... *requested SMART provide a construction estimate* [for the Jennings Crossing]”. But “*No reimbursement agreement was reached*.” Gamlen sent to Santa Rosa “a final draft of a proposed *reimbursement agreement for the at-grade crossing at Jennings Avenue*. Gamlen “explicitly stated [in an e-mail] the proposed *reimbursement agreement* ... would have to *go to the SMART Board*.” Santa Rosa Director of Transportation and Public Works “Mr. Nutt stat[ed] that he would ask the *City Manager to sign* the “*reimbursement agreement* so that it could *go to the SMART Board*. The *City* [of Santa Rosa] *hand delivered the reimbursement agreement to SMART’s administrative office*. The “*reimbursement agreement* was *signed* by the [Santa Rosa] *City Manager*. But the “*SMART Board was not asked to authorize the ... reimbursement agreement*.”

Gamlen’s testimony cited above asserts that “In *evaluating Jennings Avenue*, SMART felt “this *particular location was a bad location for a new at-grade crossing*.” Gamlen then “sen[t] a letter to the City expressing [his] concerns over an at-grade crossing at Jennings Avenue.

SMART's position was that *things had changed* since the CPUC granted the City's application." The "*Rail Safety Division oppose[d] an at-grade pedestrian and bicycle crossing at Jennings Avenue citing numerous safety concerns*. Gamlen's letter, cited above, "outlined *these same concerns raised by RSD to the City in [his] letter*." "*SMART came to agree with RSD that any support SMART initially showed for an at-grade crossing at Jennings Avenue was due to a lack of operational knowledge* on SMART's part."

Gamlen's testimony asserts that "SMART made clear that *should the City present additional safety measures for the design and construction of the proposed at-grade crossing*, SMART would *continue good faith efforts to come to a formal agreement*." "SMART and the City – *aided by [State] Senator Mike McGuire* – continued meeting in person and in writing *on the terms and conditions of an at-grade crossing at Jennings Avenue*." As well as "on *additional safety enhancements for an at-grade crossing*, [and] *reevaluating the possibility of a grade separated option*. But "between the granting of the application in 2016 and the Fall of 2019, *no agreement – for either funding or construction – had been reached for an at-grade crossing at Jennings Avenue*." "SMART and the City continued discussing *safety enhancements for an at-grade crossing and the advantages and disadvantages of revisiting new grade-separated crossing designs*."

Gamlen's testimony asserts that when "SMART [and] RSD ... opposed the City's Petition for Modification filed [in] 2019. SMART was of the *opinion* that given the *changed conditions of the Guerneville Road crossing*, not having had an opportunity to *fully evaluate the City's proposed safety enhancements* presented [by Santa Rosa] and the possibility of the parties *revisiting a grade separated option, an at-grade crossing was unsafe and unnecessary*." "However, the *CPUC disagreed with SMART [and] RSD*" [and issued D.19-10-002].

Gamlen's testimony continues "SMART participated in efforts with *Senator McGuire's* office in good faith to resolve the parties [sic] *differences on a crossing at Jennings Avenue*." Bu "there were still *outstanding safety concerns over an at-grade crossing*" as well as revisiting "*a newly designed grade separated option*, and [that had been] no response from the City on *insurance, maintenance and indemnification that would be necessary before any agreement for an at-grade or grade separated crossing could be reached*." "SMART *opposed* the City's July 16,

2021 Petition for Modification *for the same reasons as it opposed the 2019 Petition for Modification*. Despite efforts to discuss important issues such as *safety enhancements for an at-grade crossing, revisiting the possibility of a grade-separated crossing and indemnity provisions, the parties were unable to come to an agreement.*”

Under Article 12, §8 of the California Constitution, A public body, such as SMART, may not regulate matters over which the Legislature grants regulatory power to the CPUC. Under Public Utilities Code §§1201-1202 and §99152, the CPUC has exclusive jurisdiction to determine that a rail crossing meets safety requirements. D.16-09-002 approved the construction of an at-grade crossing at Jennings Avenue and ruled that “The City has convincingly shown that it has eliminated all potential safety hazards.”<sup>10</sup> Gamlen’s testimony cited above, however, asserts to the contrary that the approved Jennings Crossing is actually unsafe and SMART has authority to dictate the terms of an agreement that Santa Rosa must agree to before the approved crossing can be constructed. D.16-09-002 found that “It is impracticable to construct a grade-separated overcrossing at Jennings Avenue.”<sup>11</sup> SMART, however, disregards the Commission’s conclusion and as Gamlen’s testimony establishes – demanded that Santa Rosa “revisit” a grade-separated crossing. Gamlen’s testimony like Cumins’ testimony asserts that construction of the approved Jennings Crossing is subject to SMART’s ultimate authority rather than that of the Commission.

Under Public Utilities Code §1759(a), only the Supreme Court and the courts of appeal may review CPUC decisions. D.16-09-002, D. 17-08-017, and D.19-10-002 are all final and not subject to review. SMART has never filed an Application for Rehearing of any Commission Decision or a Petition for Modification or any actions in the state courts but regardless Gamlen’s testimony, cited above, continues to assert, contrary to those decision cited above, that the approved Jennings Crossing is unsafe and should not be constructed and reopened.

Under Public Utilities Code §1709, final CPUC decisions are conclusive in all collateral matters. D.16-09-002 has been reaffirmed by D.17-08-017, 19-10-002, and D.23-03-045 but SMART in

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<sup>10</sup> D.16-09-002 at p. 41.

<sup>11</sup> D.16-09-002 at p. 41, Conclusion of Law #10.

Gamlen's testimony, cited above, continues to disregard it as well as the other subsequent Decisions.

Under Public Utilities Code §702, public utilities' obedience and compliance with final CPUC decisions is mandatory. In D.19-10-002, the Commission directed that SMART shall comply with D.16-09-002 and cooperate in good faith with Santa Rosa to reach an agreement regarding the construction of the approved crossing at Jennings Avenue. SMART's Board has not acted to reach any construction agreement or provided any public direction to SMART's management employees. Further, SMART in Gamlen's testimony, cited above, continues to assert the approved crossing is unsafe and subject to SMART's ultimate authority rather than that of the Commission.

Under Commission Rule 1.1, a party to a proceeding agrees to comply with state laws and to respect the Commission and its Administrative Law Judges. As summarized above, SMART has failed to comply with D.16-09-002, D.17-08-017, and D.19-10-002, Public Utilities Code sections 702, 1201, 1202, 1709, 1759(a), 99152, and California Constitution Article XII, Section 8. Gamlen's testimony, summarized above, disregards and disrespects the Commission and its Administrative Law Judges.

### **Summary of Prepared Testimony of Farhad Mansourian**

#### **QUESTION 6 :**

Were you previously employed by SMART? If yes, please state your title, the dates of your employment and describe your general duties and responsibilities.  
Prepared Testimony of Farhad Mansourian, p. 3.

#### **ANSWER 6 :**

I was employed by SMART as the General Manager from 2011 until early 2022, when I retired. *As General Manager, I oversaw all aspects of SMART's Administration and Operations.* My responsibilities included, but were not limited to, developing and implementing short and long term goals and business plans to support the achievement of the SMART District's strategic vision; cultivating an external presence in the community; *fostering official and informal relationships with elected officials, public agencies*, the business

community, and civic organizations; supervising and directing preparation of SMART's overall financial plan and budget; *representing SMART in meetings* with legislative bodies, *governmental agencies*, the media, other transit organizations, the business community, and the public; ensuring adequate programming of state and federal funds district-wide to implement transportation and expansion plans; formulating policy recommendations for the SMART Board of Directors and; *executing decisions made by the SMART Board of Directors*. (Italics and emphasis added.) Prepared Testimony of Farhad Mansourian, p. 3.

**QUESTION 7 :**

As previous General Manager for SMART, are you aware of how SMART is governed? Prepared Testimony of Farhad Mansourian, p. 3.

**ANSWER 7 :**

SMART is governed by a 12-member Board of Directors. As General Manager, *I reported to the Board of Directors. I was also tasked with executing decisions made by the Board of Directors*. (Italics and emphasis added.) Prepared Testimony of Farhad Mansourian, pp. 3-4.

**QUESTION 8 :**

Are you familiar with SMART Resolution No. 2012-21? If so, please describe the resolution. Prepared Testimony of Farhad Mansourian, p. 4.

**ANSWER 8 :**

On September 19, 2012, the SMART Board of Directors passed Resolution No. 2012-21. This resolution authorized me, as General Manager, to exercise limited discretion to *enter into reimbursement agreements with individual cities, counties and other public entities, where the city, county or public entity agreed to reimburse SMART for work within the rail corridor during construction of SMART's initial operating segment* if certain parameters were met. (Italics and emphasis added.) Prepared Testimony of Farhad Mansourian, p. 4.

**QUESTION 9 :**

Were you involved in efforts to reach a *reimbursement agreement* between the City of Santa Rosa ("City") and SMART for *construction of an at-grade pedestrian and bicycle crossing* along the SMART tracks at *Jennings Avenue* in Santa Rosa? (Italics and emphasis added.) Prepared Testimony of Farhad Mansourian, p. 4.



**ANSWER 9 :**

*I was not involved in drafting the proposed reimbursement agreement between SMART and the City for construction of an at-grade pedestrian and bicycle crossing at Jennings Avenue that SMART's Chief Engineer, Bill Gamlen sent to the City of Santa Rosa on June 9, 2017. SMART's Chief Engineer, Bill Gamlen, was involved in discussions with the City regarding a draft reimbursement agreement. Prior to entering into and executing a proposed reimbursement agreement with the City for construction of an at-grade crossing along SMART's rail corridor at Jennings Avenue, the proposed agreement would have to have been presented to and approved by the SMART Board of Directors.* (Italics and emphasis added.) Prepared Testimony of Farhad Mansourian, p. 4.

Bill Gamlen sent a draft reimbursement agreement for construction of an at-grade crossing at Jennings Avenue to the City on June 9, 2017. The parameters in Resolution No. 2012-21 did not apply to the June 9, 2017 draft proposed reimbursement agreement. I did not exercise any discretion under Resolution No. 2012-12 relating to the June 9, 2017 draft proposed reimbursement agreement and the agreement was not presented to or approved by the SMART Board of Directors. The SMART Board of Directors did not approve and did not authorize me to enter into the draft proposed reimbursement agreement. (Italics and emphasis added.) Prepared Testimony of Farhad Mansourian, pp. 4-5.

**Duncan's Reply to the Prepared Testimony of Farhad Mansourian**

Mansourian's testimony cited above establishes "*As General Manager, [he] oversaw all aspects of SMART's Administration and Operations. [His] responsibilities included, "fostering official and informal relationships with elected officials [and] public agencies" "representing SMART in meetings with" "governmental agencies" "and; executing decisions made by the SMART Board of Directors."*" "As General Manager, [he] reported to the Board of Directors. [He] was also tasked with executing decisions made by the Board of Directors."

Mansourian's testimony asserts "On September 19, 2012, the SMART Board of Directors passed Resolution No. 2012-21. This resolution authorized [him], as General Manager, to exercise limited discretion to *enter into reimbursement agreements with individual cities, ... , where the city, ... , agreed to reimburse SMART for work within the rail corridor during construction of SMART's initial operating segment* if certain parameters were met."

Mansourian's testimony continues "*[He] was not involved in drafting the proposed reimbursement agreement ... for construction of an at-grade pedestrian and bicycle crossing at Jennings Avenue [that was] sent to the City of Santa Rosa on June 9, 2017.*" But "*Gamlen, was involved in discussions [with Santa Rosa] regarding a ... reimbursement agreement.*" Mansourian's testimony asserts that "*Prior to entering into and executing a proposed reimbursement agreement with the City for construction of an at-grade crossing along SMART's rail corridor at Jennings Avenue, the proposed agreement would have to have been presented to and approved by the SMART Board of Directors.*"

Mansourian's testimony concludes "*Gamlen sent [the] reimbursement agreement for construction of an at-grade crossing at Jennings Avenue [to Santa Rosa].*" "*The parameters in Resolution No. 2012-21 did not apply to [the] reimbursement agreement.*" "*[He] did not exercise any discretion under Resolution No. 2012-12 relating to [the] reimbursement agreement and the agreement was not presented to or approved by the SMART Board of Directors. The SMART Board of Directors did not approve and did not authorize [him] to enter into the draft proposed reimbursement agreement.*"

D.16-09-002 approved the construction of an at-grade crossing at Jennings Avenue. Gamlen's testimony, cited above, establishes that Santa Rosa requested SMART bid on constructing the approved crossing. SMART sent Santa Rosa a Reimbursement Agreement for SMART to construct the approved crossing with Santa Rosa paying for the construction. Santa Rosa signed the Reimbursement Agreement and hand-delivered it to SMART.

Mansourian's testimony, cited above, is that "*As General Manager, [he] oversaw all aspects of SMART's Administration and Operations*". "*As General Manager, [he] reported to the Board of Directors. [He] was also tasked with executing decisions made by the Board of Directors.*"

Mansourian cites "*Resolution No. 2012-21 [which] authorized [him], as General Manager, to exercise limited discretion to enter into reimbursement agreements with individual cities, ... , where the city, ... , agreed to reimburse SMART for work within the rail corridor during construction of SMART's initial operating segment if certain parameters were met.*" But Mansourian testimony states "*The parameters in Resolution No. 2012-21 did not apply to [the] reimbursement agreement.*" and "*[He] did not exercise any discretion under Resolution No.*

2012-12 relating to [the] *reimbursement agreement*.” Mansourian’s testimony asserts that “*the proposed [Jennings Crossing] agreement would have to have been presented to and approved by the SMART Board of Directors.*” But as Mansourian’s testimony admits “the *agreement was not presented to or approved by the SMART Board of Directors. The SMART Board of Directors did not approve and did not authorize [him] to enter into the draft proposed reimbursement agreement.*”

Regardless of whether Resolution No. 2012-12 is applicable to the Reimbursement Agreement for SMART to construct the approved Jennings Crossing, Mansourian, as General Manager, who *oversaw all aspects of SMART’s Administration and Operations* was not *involved in drafting the proposed reimbursement agreement ... for construction of an at-grade pedestrian and bicycle crossing at Jennings Avenue [that was] sent to the City of Santa Rosa.* After Santa Rosa signed the Reimbursement Agreement and hand-delivered it too SMART for presentation to the SMART Board of Directors, Mansourian testifies that it was *not presented to the SMART Board of Directors.*

Under Public Utilities Code §702, public utilities’ obedience and compliance with final CPUC decisions is mandatory. As General Manager, Mansourian asserts that he was not involved with the Reimbursement Agreement, it had to be presented to the SMART Board of Directors but it was not presented to the Board. Mansourian’s testimony, discussed above, establishes that SMART is in violation of §702.

### Conclusion

The Commission is respectfully urged to consider this Reply Testimony and the testimony previously submitted and grant the relief requested in the Complaint filed on June 7, 2021.

Respectfully submitted,

June 5, 2023

By /s/ James L. Duncan

James L. Duncan